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May 11 2023

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SUMTER COUNTY
Court of Common Pleas
R. Kirk Griffin, Circuit Court Judge

Appellate Case No. 2023-000074

Ex Parte: Liberty Mutual Insurance Company and Horace Mann Property and
Casualty Insurance Company, Respondents,

In Re:

Howell D. Thompson and Tara L. Thompson,
Appellants,

v.

Carlos D. Toney,
Defendant.

**RESPONDENT LIBERTY MUTUAL INSURANCE COMPANY'S MOTION TO
DISMISS APPEAL FOR LACK OF JURISDICTION**

INTRODUCTION

Carlos D. Toney—the Defendant in this action—never has been served with any process whatsoever. In other words, he never was served with a summons to the court below or a notice of appeal to this Court. Accordingly, Respondent Liberty Mutual Insurance Company asserts that the instant appeal must be dismissed, as the South Carolina appellate courts lack jurisdiction over this matter. This Motion is made pursuant to Rule 240 of the *South Carolina Appellate Court Rules* and is supported by the embedded Memorandum.

FACTS BEARING UPON THE MOTION

On December 5, 2019, Appellants filed the underlying action and served it upon putative UIM carriers Liberty Mutual Insurance Company (“Liberty Mutual”) and Horace Mann Property & Casualty Insurance Company (“Horace Mann”). (Initial Br. of Appellants, at 2.) After a period of discovery, it was revealed that alleged at-fault Defendant Carlos D. Toney had never been served with the Summons and Complaint. (*See id.*, at 2-8.) The underlying action was then dismissed upon the motion of Liberty Mutual and Horace Mann. (*See id.*, at 8-9 (reciting the procedural history of the UIM carriers’ successful motion to dismiss/motion for summary judgment, which was granted via order dated August 28, 2022).) The motion was granted due to the circuit court’s application of the long-established rule from this Court’s opinion in *Louden v. Moragne*. (*See id.*; *see also Louden v. Moragne*, 327 S.C. 465, 486 S.E.2d 525 (Ct. App. 1997) (holding that a UIM carrier is entitled to dismissal of the case when the at-fault driver is not served with process prior to the expiration of the statute of limitations).) Appellants’ motion to reconsider the order of dismissal was denied on December 21, 2022. (*See id.*, at 9.)

On January 19, 2023, Appellants filed and served the Notice of Appeal in the above-captioned case. (Not. Appeal.) Appellants served the Notice of Appeal upon the undersigned, as counsel for Liberty Mutual, and upon Karl S. Brehmer, Esq., as counsel for Horace Mann. (*Id.*, at Proof of Svc.) The Notice of Appeal is captioned as “Howell D. Thompson and Tara L. Thompson, Appellants v. Carlos D. Toney, Respondent.”¹ (*Id.*) There is no record in this Court that the Notice of Appeal was ever served upon Carlos Toney, nor is there any record in this Court of an appearance by Toney or counsel on his behalf.

¹ The caption was later amended by the Clerk of Court for the Court of Appeals into the version of the caption that appears above.

APPLICABLE LAW

“The notice of appeal in a case appealed from the Court of Common Pleas must be served on *all respondents* within thirty days after receipt of written notice of entry of the order or judgment.” *Elam v. S.C. Dep’t. of Transp.*, 361 S.C. 9, 14, 602 S.E.2d 772, 775 (2004) (citing Rule 203(b)(1), SCACR) (emphasis added). “The requirement of service of the notice of appeal is jurisdictional, i.e., if a party misses the deadline, the appellate court lacks jurisdiction to consider the appeal and has no authority or discretion to ‘rescue’ the delinquent party by extending or ignoring the deadline for service of the notice.” *Id.* at 14-15, 602 S.E.2d at 775 (citing *Mears v. Mears*, 287 S.C. 168, 337 S.E.2d 206 (1985)). “The time prescribed by these Rules for performing any act *except for the time for serving the notice of appeal* under Rules 203 and 243 may be extended or shortened by the appellate court...” Rule 263(b), SCACR.

ARGUMENT

Carlos Toney is a necessary party to this case—both in the court below and before this Court—and should have been served with the Notice of Appeal. Appellants cannot contend otherwise. In their Initial Brief, filed in this Court on March 23, 2023, Appellants contend that the circuit court erred in dismissing the underlying action because, *inter alia*, they claim service was procured upon Toney via an alleged voluntary appearance. (Initial Br. of Appellants, at 11-15.) According to Appellants’ reasoning, if Toney voluntarily appeared in the circuit court, then the action was commenced as to Toney and never should have been dismissed. (*Id.* at 15.) In fact, Appellants assert that a finding of voluntary appearance is so important, it would dispose of this entire appeal. (*Id.* at 15 n.7.)

Assuming for the sake of argument that Appellants' argument about voluntary appearance in the circuit court is correct,² then Toney would have been joined as a party in the action below and therefore it is inexcusable that Appellants did not serve Toney with the Notice of Appeal to this Court. The notice of appeal must be served on "all respondents," pursuant to Rule 203(b)(1), SCACR, otherwise the appellate court lacks jurisdiction. *See Elam, supra*. As discussed below, Toney is the true defendant in the court below. Thus, he is the adverse party to Appellants before this Court, making him a "respondent" as that term is defined in the *Appellate Court Rules*. *See* Rule 202(a), SCACR; *see also* S.C. Code Ann. § 18-1-120 (stating same). All respondents to an appeal must be served via one of the methods prescribed in Rule 262, SCACR, and none of those methods were used upon Toney in this appeal.

The fact that Liberty Mutual, a putative UIM carrier, has been served with the Notice of Appeal does not operate to excuse this deficiency. In a UIM case, the law is clear that even though the judgment might be collected ultimately from the UIM carrier, the case is still a traditional plaintiff-versus-defendant lawsuit that requires jurisdiction over the named defendant to render a valid judgment:

Louden argues that although Moragne is the named defendant, the underinsured motorist carrier is the real party in interest. We find this argument unpersuasive. The fact that any judgment rendered will not ultimately be collected from the named defendant but from the insurance company does not excuse the fundamental requirements of personal service. A court may not enter a valid judgment against an individual over whom the court lacks personal jurisdiction.

Louden, 327 S.C. at 468, 486 S.E.2d at 526. The *Louden* court also explained:

In the present case, the negligence action *is against the at-fault driver* and not directly against the insurance company. Service on the at-fault driver is an essential component of the negligence action. Thus, we hold that the named

² The circuit court held that Toney did not engage in a voluntary appearance in the court below. If that is correct, then the underlying action was never commenced as to Toney at all and Liberty Mutual should be entitled to prevail on the merits of this appeal. If necessary, Liberty Mutual will make this argument in a forthcoming initial brief.

defendant in an action for benefits under a plaintiff's underinsured motorist policy must be properly served with the summons and complaint prior to the running of the statute of limitations.

Id. at 469, 486 S.E.2d at 527 (emphasis added). The law is also clear that service of the Notice of Appeal upon Liberty Mutual's counsel cannot count as service of the Notice of Appeal upon Toney. *See Crawford v. Henderson*, 356 S.C. 389, 398, 589 S.E.2d 204, 209 (Ct. App. 2003) (holding that there is no attorney-client relationship between the named defendant and a UIM carrier).

CONCLUSION

Appellants seek to "have their cake and eat it too," by arguing that Toney was served in the court below but then ignoring the requirement that he be served in this Court. Appellants' failure to procure service of the Notice of Appeal upon Carlos Toney is fatal to this appeal because this Court is without jurisdiction over Toney. Toney is the party against whom this action is filed, and Appellants have failed to summon him to either the circuit court or this Court. Therefore, this appeal must be dismissed.

Respectfully submitted,

SWEENY, WINGATE & BARROW, PA

s/ Aaron J. Hayes

Richard E. McLawhorn, Jr.

Aaron J. Hayes, SC Bar No. 100114

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**ATTORNEY FOR RESPONDENT LIBERTY
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Joined and adopted:

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s/ Karl S. Brehmer

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**ATTORNEY FOR RESPONDENT HORACE
MANN PROPERTY & CASUALTY
INSURANCE COMPANY**

Columbia, South Carolina

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Casualty Insurance Company, Respondents,

In Re:

Howell D. Thompson and Tara L. Thompson,
Appellants,

v.

Carlos D. Toney,
Defendant.

PROOF OF SERVICE

I certify that a true copy of the foregoing Respondent Liberty Mutual Insurance Company's Motion to Dismiss Appeal for Lack of Jurisdiction in this case has been served on the following, this 11th day of May, 2023, by emailing a copy to each attorney listed below using their primary email address listed in the Attorney Information System pursuant to Rule 262 of the South Carolina Appellate Court Rules and the May 6, 2022 Order of the South Carolina Supreme Court (Appellate Case No. 2020-000447):

G. Murrell Smith, Jr., Esq., counsel for Appellants, at murrell@smithrobinsonlaw.com
Jonathan M. Robinson, Esq., counsel for Appellants, at jon@smithrobinsonlaw.com
Shanon N. Peake, counsel for Appellants, at shanonp@smithrobinsonlaw.com
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Theile B. McVey, Esq., counsel for Appellants, at tmevey@kassellaw.com

Jamie R. Rutkowski, counsel for Appellants, at jrutkowski@kassellaw.com
Andrew N. Safran, Esq., counsel for Appellants, at msa6631@aol.com
Karl S. Brehmer, Esq., counsel for Respondent Horace Mann, at ksb@brownandbrehmer.com

Respectfully submitted,

SWEENEY, WINGATE & BARROW, PA

s/ Aaron J. Hayes

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Columbia, South Carolina

May 11, 2023



SWEENEY WINGATE & BARROW

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Reply to: Main Office

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VIA E-FILING AND HAND-DELIVERY:

The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
1220 Senate Street
Columbia, South Carolina 29201

RE: Ex Parte: Liberty Mutual Insurance Company, et al., Respondents
In Re: Howell & Tara Thompson, Appellants v. Carlos Toney, Defendant
Appellate Case No.: 2023-000074
Our File: 5590-12532

Dear Ms. Kitchings:

Please find attached for electronic filing a copy of Respondent Liberty Mutual Insurance Company's Motion to Dismiss Appeal in the above-referenced matter. Hand-delivered with a copy of this letter (without enclosures) is a check for the \$50.00 filing fee. Please let me know if anything further is required from Respondent Liberty Mutual concerning this motion.

Sincerely,

SWEENEY, WINGATE & BARROW, P.A.


Aaron J. Hayes

AJH/tnn

cc (via hand-delivery): Clerk of Court, South Carolina Court of Appeals (filing fee only)
cc (via email): Richard E. McLawhorn, Jr., Esquire
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John D. Kassel, Esquire
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